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10 The Honorable Jay V. White  
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12 UNITED STATES DISTRICT COURT  
13 WESTERN DISTRICT OF WASHINGTON AT SEATTLE  
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15 GREGORY McNEILL and WILMA ARMER,  
16 individually and on behalf of all others similarly  
17 situated,

18 NO. 08-01731 RSL

19 Plaintiffs,

20 v.

21 OPENMARKET, INC., a Michigan  
22 corporation; SPRINT SPECTRUM, L.P., a  
23 Delaware limited partnership; and NEXTEL  
24 WEST CORPORATION, a Delaware  
25 corporation,

26 NOTICE OF APPEAL TO THE  
27 UNITED STATES COURT OF  
28 APPEALS TO THE NINTH CIRCUIT

29 Defendants.

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31 SPRINT SPECTRUM, a Delaware limited  
32 partnership; and NEXTEL WEST CORP., a  
33 Delaware corporation,

34 Cross-Claimants,

35 v.

36 OPENMARKET INC., a Michigan corporation,

37 Cross-Defendant.

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NOTICE OF APPEAL TO THE UNITED STATES COURT  
OF APPEALS TO THE NINTH CIRCUIT - 1  
No. 08-01731 RSL

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OPENMARKET INC., a Michigan corporation,

### Cross-Claimant,

V.

SPRINT SPECTRUM, L.P., a Delaware limited partnership; and NEXTEL WEST CORP., a Delaware corporation,

## Cross-Defendants.

Notice is hereby given that OpenMarket Inc., Defendant and Cross-Defendant in the above-captioned action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the United States District Court for the Western District of Washington, Seattle Division entitled "Order Regarding Retention of Counsel" entered in this action on January 4, 2010 and attached hereto as Exhibit A.

DATED this 2nd day of February, 2010.

By: *s/*Jeffrey M. Thomas

Attorneys for Defendant OpenMarket Inc.

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NOTICE OF APPEAL TO THE UNITED STATES COURT  
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NOTICE OF APPEAL TO THE UNITED STATES COURT  
OF APPEALS TO THE NINTH CIRCUIT - 3  
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## **CERTIFICATE OF SERVICE**

I hereby certify that on February 2, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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By *s/Carol L. Russell*

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NOTICE OF APPEAL TO THE UNITED STATES COURT  
OF APPEALS TO THE NINTH CIRCUIT - 4  
No. 08-01731 RSL

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EXHIBIT A

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WILMA ARMER, *et al.*,

Plaintiffs,

V.

OPENMARKET, INC., *et al.*,

## Defendants.

No. C08-1731RSL

## ORDER REGARDING RETENTION OF COUNSEL

This matter comes before the Court on “Sprint’s Motion to Enforce the Court’s # 79. On October 5, 2009, the Court ordered OpenMarket, Inc., to defend Sprint P. and Nextel West Corp. against the allegations of the Second Amended Complaint. The Court’s order was issued in accordance with the parties’ mutual expectation that OpenMarket would conform its conduct to the order. Dkt. # 76 at 1. The Court’s order did not preclude the parties from pursuing their own claims. The existence of cross-claims between defendants, the open conflict regarding defense under the Messaging Application Services Agreement (“MASA”), and the likelihood that defendants’ positions on liability and indemnity will be adverse to OpenMarket insists that its counsel can represent both defendants.

22 OpenMarket's position seems to be that, because the October 5, 2009, Order and  
23 the MASA do not explicitly require retention of conflict-free counsel, OpenMarket has no such  
24 obligation. There are other rules and codes that govern the conduct of attorneys, however. If, as  
25 appears to be the case, Wilmer Cutler and Gordon Tilden cannot think of any reason why the  
26 proposed dual representation is unworkable, they should review the Rules of Professional

ORDER REGARDING RETENTION  
OF COUNSEL

1 Conduct, particularly Rule 1.7. OpenMarket has grudgingly accepted the Court's determination  
2 that it must defend Sprint in this litigation and has reserved the right to contest its defense and  
3 indemnity obligations on appeal. Decl. of Frederic R. Klein (Dkt. # 80), Ex. A; Opposition (Dkt.  
4 # 83) at 3 n.1. Thus, if OpenMarket's counsel were to represent both OpenMarket and Sprint,  
5 the litigation strategy that would be most beneficial to OpenMarket (to paint Sprint as the  
6 culpable party should the jury find liability and then disavow its indemnification obligations on  
7 appeal) would be directly adverse to Sprint. In the circumstances presented here, there is an  
8 unwaivable conflict of interest: OpenMarket's counsel cannot, consistent with their professional  
9 obligations, represent Sprint in this matter.<sup>1</sup>

10 For all of the foregoing reasons, Sprint's motion to enforce is GRANTED.  
11 OpenMarket must retain a separate and independent firm to represent Sprint in this matter.  
12 OpenMarket has the choice of retaining Sprint's current counsel or hiring new counsel:  
13 regardless, the retained firm must have the experience and expertise necessary to defend Sprint  
14 in this litigation.

15 Dated this 4th day of January, 2010.

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18 Robert S. Lasnik  
19 United States District Judge  
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22 <sup>1</sup> OpenMarket points out that § 10.3 of the MASA gives OpenMarket the right to settle or  
23 defend with its own counsel. Had OpenMarket acknowledged its defense and indemnification  
24 obligations under the MASA, the risk of conflict would have been substantially reduced such that joint  
25 representation may have been possible (as often occurs when an insurance company handles the defense  
26 for its insured). In the circumstances presented here, however, OpenMarket has not voluntarily agreed  
to defend or indemnify and apparently intends to contest its obligations on appeal. It would be folly for  
Sprint to turn its defense over to attorneys who have an adversary's interests at heart, and it would be  
unethical for the attorneys to accept such representation if offered.